IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 492

ALBERT L. ADELMAN AND ELEANOR ADELMAN,
Petitioners,

v.

ST. LOUIS FIRE AND MARINE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals was reported in .... F. 2d .... (D.C. Cir. 1961) (not reported as of this date).

The opinion of the District Court was not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered June 22, 1961. A petition for rehearing was denied August 11, 1961. The petition for a writ of certiorari was filed Oct. 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). and Rule 19(b) revised rules of the Supreme Court.

QUESTION PRESENTED

In a civil action, the Court of Appeals below, affirmed the decision of the District Court on an insurance problem involving a fire loss which arose in Maryland on a policy written in Maryland. Did the District Court of the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit base their decisions on Maryland law and correctly apply Maryland law?

STATEMENT OF THE CASE

Petitioners sustained a fire loss at their home in Silver Spring, Maryland, on April 16, 1959. (R. 6) At the time of loss petitioners' dwelling was insured by the American Equitable Insurance Company in the sum of $14,000.00 (R. 63). There was another policy on the furniture with American Insurance Company in the amount of $7,500.00 (R. 7). Petitioners also claimed under the policy issued by respondent. It was dated June 15, 1958 and dated to expire three years later (R. 28). Petitioners claimed the cancelled check in payment of the policy premium was destroyed in the fire. (R. 11) The bank on which petitioner says the check was drawn had no record of a check drawn by petitioner either

exactly or approximately in the amount of the premium at or near the time petitioner says the check was issued. (R. 13-14) The agent to whom the payment should have been paid also had no record of such payment.

Several hours after the fire an insurance adjuster was called by the insurance agent. Adjuster White representing respondent called on petitioners at the scene of the fire. At the time White had very little information as to policy coverage. He mentioned the petitioners seemed surprised that the policy in issue might be in effect. (R. 19-20) At the time he noticed that the other companies had already been on the scene and taken whatever action was necessary to preserve the property. Upon learning of a policy violation*, a non-waiver agreement was obtained by White. This was six days after the fire. The non-waiver agreement preserved the rights of the parties as to the possible incidents or the effects of investigation. (R. 43) Only one statement was ever taken from or offered by the Adelmans. That statement related only to the circumstances of acquiring fire insurance by the Adelmans and the coverage thereof. (R. 44) White had several calls from the Adelmans and advised them that he had had no instructions as to the company's attitude toward liability. (R. 22) At least as early as June 24, and apparently prior thereto, petitioners were represented by counsel. (R. 35) On August 27, 1958, more than two months after time provided by the contract,

* The policy contained the provision that "other insurance covering the dwelling insured hereunder (except existing insurance for which credit is given in this policy of insurance against perils not covered by this policy) is not permitted." There was such other insurance.

a purported proof of loss was filed. Thereafter on September 30, 1959, White received word that the matter had been referred to counsel. (R. 22) On October 13, 1959, petitioner's counsel was notified that the company denied liability. (R. 43)

Petitioners filed suit and the case was tried before the District Court of the District of Columbia without a jury. The District Court found that the petitioners failing to file written proof of loss within the required time prevented any recovery, citing Maryland cases for authority.

Petitioners appealed to the Court of Appeals of the District of Columbia Circuit and the Court of Appeals affirmed the District Court in a per curiam opinion that cited as authority a District of Columbia Court of Appeals case that was based on Maryland law. Petitioners unsuccessfully sought a rehearing on the ground District of Columbia law not Maryland law was applied.

ARGUMENT

I

The law of Maryland was applied

The Respondent admits that the law of Maryland is applicable to this case and submits that Maryland law was applied by the Court of Appeals.

In its per curiam opinion, the Court of Appeals cites *Glenco Corp.* v. *American Equitable Assurance Co.*, 289 F. 2d 899 (D.C. Cir. 1961). In that case, which involved a fire loss in the state of Maryland, the Court of Appeals, in deciding for the insurance company,

held that the plaintiff must comply with the proof of loss provisions of the policy, and found no evidence of waiver of such provision, citing for authority *Taubman* v. *Allied Fire Insurance Co. of Utica* et al 160 F. 2d 157 (4th Cir. 1947)

The *Taubman* case also involved a fire loss in the state of Maryland and Court of Appeals for the Fourth Circuit reviewed extensively the law of Maryland relative to compliance with the proof of loss provisions of fire insurance policies. Moreover, the District Court in the instant case cited *Grangers Mutual Fire Insurance Co. of Frederick, Md.* v. *Bleire*, 157 Md. 426, 146 A. 239, in support of its opinion.

II

The law of Maryland was correctly applied

The petitioners cite *Federal Mutual Fire Insurance Co.* v. *Julian*, 144 Md. 380; 125 A. 299, for authority that a denial of liability by the insurer waives the requirement for filing of a proof of loss even though the denial occurs after the sixty day period for filing. This statement correctly reflects the result of that case but the law of the case, stated on page 384 in quoting from *Rokes* v. *Amazon Insurance Co.*, 51 Md. 512, is that a waiver ". . . may be inferred from the acts and conduct of the insurer in-consistent with an intention to insist upon the strict performance of the conditions." In the instant case, there is the additional fact not mentioned in the petition, that less than one week after the occurrence of the loss, the petitioners executed a non-waiver agreement, wherein the parties agreed that any action taken by the insurance company shall

not "waive or invalidate any of the terms or conditions of any policy or policies and shall not waive or invalidate any right whatever of either of the parties to this agreement." (R. 43). In plain terms this agreement shows the intention of the parties to strictly preserve all rights and insist upon strict performance of all conditions of the policy.

The petitioners cite no Maryland authority wherein denial of liability by the insurance company or retention of an untimely proof of loss constituted a waiver of a non-waiver agreement. In *Fireman's Insurance Company* v. *Floss*, 67 Md. 403; 10 A. 139, cited by petitioners, there was no non-waiver agreement and the company continued investigation and negotiations after the alleged defective proofs of loss were filed. In *Bakhaus* v. *Caledonian Insurance Co.*, 112 Md. 676; 77 A. 310, *Continental Insurance Co.* v. *Burns*, 144 Md. 429; 125 A. 232 and *Citizens Fire Insurance Co.* v. *Doll*, 35 Md. 89 also cited by petitioners there were no non-waiver agreements executed. In the *Doll* case, however, the Court refused to imply a waiver where the insurance company expressly informed the insured that the proofs of loss submitted were not satisfactory and that it reserved all objections without waiving any of its rights under the policy.

Five years after the *Julien* case, *supra*, the highest court of Maryland decided the *Blieve* case, *supra*. The *Blieve* case would appear to be closest in point to the instant case and was cited by the District Court below in its opinion. There no proof of loss was filed by the insured and a non-waiver agreement was executed. In finding that there had been no waiver of the proof of

loss provisions of the policy the Court of Appeals of Maryland said at page 428:

> ". . . we do not find any recognition of liability on behalf of the company here, any expression of willingness to proceed with the settlement of questions of liability, without the sworn proofs of loss, or any representation or statement to the insured which might lead her to assume that the requirement might be dispensed with, or to make her delay compliance."

The question of whether there was a waiver of the proof of loss provision is one of fact for the trier of facts. *Continental Insurance Co.* v. *Burns, supra, Citizens Fire Insurance Co.* v. *Doll, supra.* In the instant case the District Court, without the aid of a jury, evaluated the evidence offered at trial and decided that there had been no waiver on the part of respondent.

REASONS FOR DENYING WRIT

The Court of Appeals for the District of Columbia Circuit has applied Maryland law and done so correctly consistent with the usual course of judicial proceedings. Moreover, the question presented is one of fact and accordingly is beyond the pale of need for exercise of this Court's power of supervision.

For the reasons stated the writ should be denied.

Respectfully submitted,

ANDREW D. SHALPE